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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM 1973

NO. 73-57

CLAYTON E. BLAKEWAY, ET AL,
*Petitioner*

v.

SOUTHERN NATIONAL BANK OF HOUSTON,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS FOURTEENTH JUDICIAL DISTRICT

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS FOURTEENTH JUDICIAL DISTRICT

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*To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:*

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Texas, entered in the above case on January 24, 1973.

## CITATIONS TO OPINIONS BELOW

The Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas wrote an opinion which appears as Appendix "A" and which can also be found at *Southern National Bank v. Clayton E. Blakeway, et al,* 487 S.W.2d 234 (Houston Civ. App. 1972). The Texas Supreme Court Order denying Petitioner's Application for Writ of Error and Order denying rehearing are printed in Appendix "B".

## JURISDICTION

The Judgment of the Texas Supreme Court was entered on January 24, 1973. (R 21). The Motion for Rehearing was denied on April 4, 1973. (R. 21).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## PRELIMINARY STATEMENT

Petitioners are aware that it is only in rare and unusual cases that this Court will grant a Writ of Certiorari to a State Supreme Court. Petitioner respectfully submits that this is such a rare and unusual case justifying the attention of this Court. A jury verdict in excess of One Million ($1,000,000.00) Dollars based on findings of breach of oral contract and false misrepresentations, which were supported by legally sufficient evidence, have been taken away from Petitioner by an appellate court which not only disregarded its own Rules of Procedure and the Constitution of the State of Texas, but administered a standard of Justice beneath the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Invoking a rule of law to take away the jury's verdict for petitioner on breach of oral contract the Court proceeded to take away Petitioner's verdict on his second cause of action by ignoring it and rendering Judgment for the Bank. Such gross indifference to the rights of an individual and his right of a jury trial when pitted against a National Bank is a subversion of our Constitution and the even handed administration of Justice.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Supreme Court's approval of the lower Court's failure to announce in writing their conclusion on all assigned points of error as required by Rule 451 of the Texas Rules of Civil Procedure constituted a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

2. Whether the Texas Supreme Court's refusal to apply the decisional "law of the land" to Petitioner's case constituted a denial of due process of law and equal protection under the Fourteenth Amendment of the United States Constitution.

3. Whether the appellate procedure followed by the Texas Supreme Court and its refusal to correct a manifest errror by the lower Appellate Court deprived Petitioner of the right to a jury trial guaranteed by the Texas Constitution and therefore denied Petitioner the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

4. Whether the Texas Supreme Court's internal procedure of reviewing cases is violative of Article V §2 and Article I §19 of the Texas Constitution and therefore a denial of due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

Texas Constitution, Art. 1, §15. RIGHT TO TRIAL BY JURY

Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be

needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days by order of the County Court without the necessity of a trial by jury. As amended Aug. 24, 1935.

Texas Constitution, Art. 1, §19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Texas Constitution, Art. 5, §2. SUPREME COURT; JUSTICES; SECTIONS; ELIGIBILITY; ELECTION; VACANCIES

Sec. 2. The Supreme Court shall consist of a Chief Justice and eight Associate Justices, any five of whom shall constitute a quorum, and the concurrence of five shall be necessary to a decision of a case; provided, that when the business of the court may require, the court may sit in sections as designated by the court to hear argument of causes and to consider applications for writs of error or other preliminary matters.

United States Constitution, XIV Amendment Sec. 1. AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

A summary of the evidence in this case has been attached as Appendix "A" to Petitioner's application for Writ of Error to the Texas Supreme Court and will not be detailed here except to alert the Court to the more salient findings of the jury. The jury's findings as set forth in the Judgment entered by the trial court are attached as Appendix "C". Petitioner brought his action against the Southern National Bank before the 11th Judicial District Court of Harris County, Texas, alleging two causes of action; (1) breach of an oral contract to operate and sell the Crest Hotel of Austin, Texas; (2) the Tort of False Misrepresentation based on certain fraudulent inducements to encourage the Petitioner to operate the Hotel for the benefit of certain lien holders including Southern National Bank. At the close of the evidence, Southern National Bank filed their Motion for Instructed Verdict alleging that Petitioners' first cause of action was barred by the Statute of Frauds, which Motion was overruled by the trial court. The jury found for the petitioner on both causes of action and assessed damages against the Bank under both causes of action in the amount of One Million Three Hundred Fifty-Six Thousand Eight Hundred Eighty-Six and 03/100 ($1,356,886.03) Dollars. Specifically, under the first cause of action, the jury found that the parties did enter into an oral agreement on May 31, 1966, wherein plaintiff would operate the Hotel

for a period of six to eight months; plaintiff would have six to eight months to refinance a Three Million Three Hundred Thousand ($3,300,000.00) Dollar loan, or secure another purchaser, or secure a lessee; that plaintiff could have the profit, if any, from any such refinancing, sale or lease; and that defendant Bank would not take less than Six Hundred Thousand ($600,000.00) Dollars for the Hotel at a scheduled foreclosure sale. Under the theory of false misrepresentations, the jury found that the defendant Bank represented to plaintiff Blakeway that he would have six to eight months in which to recast financing, find a purchaser, or secure a lessee; that he could retain the excess, if any, over and above the Three Million Three Hundred Thousand ($3,300,000.00) Dollars outstanding against the Crest Hotel; that he could continue to operate the Hotel for a period of six to eight months; and that the defendant Bank would not accept less than One Hundred (100) cents on the dollar for an outstanding Six Hundred Thousand ($600,000.00) Dollar note; and that such false representations were a material inducement to the plaintiff Blakeway and that plaintiff Blakeway relied on the truth of such representations.

After a partial remittitur ordered by the trial court defendant Bank appealed the judgment to the Texas Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. In due time, petitioner Blakeway responded to the Bank's Brief with his Brief, and in addition, filed his Motion to Dismiss the appeal based on the Bank's failure to properly perfect its appeal in accordance with the Texas Rules of Civil Procedure.

It was at this point that certain events began to occur which are made the basis of this appeal. Taking away

the jury verdict for the petitioner Blakeway on both causes of action the Fourteenth Court of Civil Appeals held that defendant Bank's Motion for Instructed Verdict should have been granted. No reference was made to petitioner Blakeway's second cause of action on which the jury had awarded him a verdict in excess of a Million Dollars, nor was any reference made to petitioner Blakeway's Motion to Dismiss the appeal, all such omissions being in violation of Rule 451 of the Texas Rules of Civil Procedure. The Court did hold that there was sufficient evidence to support all of the jury's findings. The Court's omissions in failing to rule on all points of error assigned was carefully pointed out to the Court by Petitioners' Motion for Rehearing, but all to no avail.

Petitioner Blakeway duly perfected his appeal to the Texas Supreme Court confident that the lower court's rendering to ashes of a Million Dollar jury verdict based on findings of fraud would be given a full and fair exposition. The Texas Supreme Court without comment placed a stamp of approval upon the action taken by the Court of Civil Appeals. At no time during the Texas appellate process were reasons assigned as to why no judicial review would be given to petitioners' assigned points of error relating to his second cause of action sounding in tort and his Motion to Dismiss the Appeal because of jurisdictional defects.

## REASONS FOR GRANTING THE WRIT

1. Southern National Bank is a National Bank Corporation chartered pursuant to the provisions found at 12 U.S.C.A. §21 et seq. As a National Bank, it is a constitutional instrumentality of the Federal Government created for a public purpose and subject to the paramount

authority of the United States Supreme Court. A jury finding that this constitutionally protected Bank made fraudulent misrepresentations causing damage to the petitioner in excess of One Million ($1,000,000.00) Dollars has created a question of general public importance worthy of this Court's notice. Especially is this so when a State Appellate Court confirms the weight of the evidence to support this finding but refuses to require the Bank to submit to the consequences of that finding.

2. Rule 451 of the Texas Rules of Civil Procedure states that "The Court of Civil Appeals shall decide all issues presented to them by proper assignments of error by either party, whether such issue be of fact or of law, and announce in writing their conclusions." Rule 453 states that "conclusions of fact and law upon each material point assigned as error in the Court of Civil Appeals shall be made and filed within thirty (30) days after the decision of the case, if the case be one in which the Supreme Court has jurisdiction of an application for writ of error. The evidence need not be stated, except when necessary to determine the correctness of some ruling of the Court. Such findings of fact and conclusions of law may be included in the opinion."

By his first counterpoint in paragraph 4 of petitioners' Brief to the Court of Civil Appeals and in assignments of error number 4, 20, 21, and 22, in his Motion for Rehearing, petitioner raised the issue of the jury findings on fraud as a separate basis for recovery and complained of the Court's failure to rule on the issue of whether the Bank had timely perfected their appeal.

By points of error number 1, 4, 20, 21, and 22, in petitioners' Application for Writ of Error to the Texas

Supreme Court and point number 1 in their Motion for Rehearing, petitioner raised the above issues as well as alerting the Texas Supreme Court that a claim was being made that Federal constitutional rights were being abrogated. The Texas Appellate Courts have yet to rule on the above points and announce in writing their conclusions. Their steadfast refusal can only be construed as an evasion of the Constitutional issue conferring on the Court the power to determine whether the State Court's decision rests on a fair or substantial basis. *Fox River Paper Co. v. Railroad Commission of Wisconsin,* 274 U.S. 651 (1927); *Broad River Power Co. v. State of South Carolina,* 281 U.S. 537 (1930); *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36 (1944).

3. In a case decided several months before the above case was presented to the Texas Supreme Court on Application for Writ of Error, the Texas Court in a well reasoned opinion held that promissory estoppel was a viable doctrine in Texas and that Article 3995 subdivision 4 cases (Statute of Frauds) presented no exception to its application. *Moore Burger, Inc. v. Phillips Petroleum Co.,* 16 Tex. Sup. Ct. J. 11 (Oct. 4, 1972). That decision has not been overruled and thus represents the "law" in Texas. The issues in petitioner's case were squarely in point with the rule announced by the Texas Supreme Court but that Court refused to apply its force to petitioner's case. The reasons remain shrouded in mystery since there was no discussion of the contentions presented. The significant fact is that the "Moore Burger" case was decided subsequent to the decision of the Court of Civil Appeals and thus the only written appellate opinion in this case does not even touch the substantial issue presented. This selective refusal to apply the de-

cisional law of the land to petitioner's case represents a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution as well as a denial of due process.

4. The Texas case of *Hooks v. Bridgewater,* 229 S.W. 1114 (Tex. Sup. Ct. 1921) provides that the Statute of Frauds may not be invoked as a defense where the facts justify the intervention of equity. Petitioner contended before the Texas Court of Civil Appeals and the Texas Supreme Court that the findings by the jury to special issues number 7 through 11 constituted not only an independent basis of recovery but also constituted a finding of facts sufficient to justify the intervention of equity referred to in *Hooks v. Bridgewater.* The Court of Civil Appeals held that these jury findings of false misrepresentations were supported by legally sufficient evidence. Nevertheless, they held that these findings of false misrepresentations did not justify the intervention of equity to estop the Bank from asserting the Statute of Frauds as a defense. There was no discussion of petitioner's contentions that the findings constituted an independent basis of recovery apart from the jury findings that the Bank had breached an oral contract. In effect, the Texas Appellate Courts have substituted their judgment for that of the jury, denying petitioner his right to a trial by jury guaranteed by the Texas Constitution.

5. In a special commentary to Texas Rule of Civil Procedure 469, a copy of which is attached and marked Appendix "D", the Honorable Robert W. Calvert, former Chief Justice of the Supreme Court of Texas, explained the internal procedure of the Court for reviewing Applications for Writs of Error. The Court no longer works

in "sections" but rather an application is assigned to an individual Justice who makes a report on it at a "conference." Art. 5, § 2 of the Texas Constitution provides that the concurrence of five (5) Justices is necessary to a decision of a case, provided that when the business of the Court may require the Court may sit in "sections" to consider applications for Writ of Error. Under the new procedure internally adopted by the Court, one Justice can effectively control the decision making process.

While adminstrative innovation to control the docket may be commendable, it is obvious in this case that Justice has not been done and that the adopted procedure is patently violative of the Texas Constitution and thus constitutes a denial of due process under the Fourteenth Amendment to the United States Constitution.

## CONCLUSION

For the foregoing reasons petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

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## CERTIFICATE OF SERVICE

I, Warner F. Brock, do hereby certify that on this 6th day of July, 1973, a true copy of the foregoing Petition For Writ of Certiorari To The Supreme Court of Texas has been forwarded to George H. Hagle, of the law firm of Andrews, Kurth, Campbell & Jones, Attorneys At Law, 2500 Exxon Building, Houston, Texas 77002, by certified mail-return receipt requested.

Warner F. Brock

Warner F. Brock

## APPENDIX A

SOUTHERN NATIONAL BANK OF HOUSTON,
Appellant,

v.

Clayton E. BLAKEWAY et al., Appellees.

No. 622.

Court of Civil Appeals of Texas,
Houston (14th Dist.).

Aug. 2, 1972

[487 S.W.2d 234]

Rehearing Denied Sept. 13, 1972.

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Action to recover from junior lienholder for breach of agreement to foreclose lien on hotel and effect resale of property to plaintiff or his nominee, in which defendant filed counterclaims on note given by plaintiff and for deficiency suffered on lien note which was foreclosed. The District Court, Harris County, Wm. N. Blanton, Jr., J., rendered judgment for plaintiff and denied recovery on counter-claims, and defendant appealed. The Court of Civil Appeals, Tunks C. J., held that oral promise of holder of second lien on hotel property, which was owned by partnership, to effect a resale to one partner or his nominee following expected foreclosure, with allowance to such partner of any resulting profits, was unenforceable under statute of frauds and, thus, partner was not

entitled to recover damages for breach of agreement. In addition, the Court held that defendant was entitled to recovery on one counterclaim.

Affirmed in part and reversed in part and rendered.

* * *

TUNKS, Chief Justice.

In August of 1964 Clayton Blakeway, William B. Ward and Wilbur Clarke formed a Texas limited partnership, Austin Crest Venture, Ltd., to build the Crest Hotel in Austin. The site, overlooking Town Lake, was sold by Blakeway to the limited partnership.

The cost of such venture was estimated to be 3.3 million dollars. Of this amount, six Austin banks and savings and loan associations and a San Antonio Savings and Loan Association (hereafter referred to as the Austin group) executed their commitment to the partnership in the sum of 2.7 million dollars. Quality Industries, known as Tri-Financial Corporation, committed itself to the remaining $600,000.00. The interim financing was through Southern National Bank on a preclosed loan basis.

Austin Crest Venture, Ltd., leased the land and hotel, when completed, to W. C. Austin, Inc., a corporation, the stock of which was owned 50% by Clarke and 50% by Ward. W. C. Austin, Inc. entered into a management contract for the hotel with Wilbur Clarke Crest Hotel, Inc., a management company owned by Wilbur Clarke Inns of America, Inc.

During construction of the hotel Wilbur Clarke died. His estate thereafter refused to release any money for

this venture and the administrators began the winding up of his estate. William B. Ward, the other of the three partners, left the country shortly after the opening of the hotel and at the time of trial had not been heard from since. Clayton Blakeway was left to run the hotel.

Initially, the closing of the permanent financing was to be on February 4, 1966, when the interim lender, Southern National Bank, was to be paid off by the permanent lenders, the Austin group and Quality. The Austin group sought a one-year extension of the closing date so as to keep their loan ratios in balance. A 90 day extension agreement was reached between Southern and the Austin group, but no such agreement was made with Quality. On February 4, 1966, Southern tendered the $600,000.00 note to Quality, but Quality did not buy it. The nature of the controversy that resulted from Quality's failure to take its portion of the permanent financing is not clear from this record. That controversy seems to be the subject of another lawsuit.

During the 90 day extension period Clayton Blakeway continued to operate and manage the hotel, investing his money into the operation. He sought to sell the hotel or find a hotel chain to take over the operation of it. The title to the property, being held by a limited partnership of which one partner had disappeared and another had died, coupled with the rumor that another person had bought or was to buy all of Ward's and/or Clarke's interest, was somewhat clouded.

On May 2, 1966, the end of the 90 day extension period, Southern met with the Austin group and Blakeway. Upon Blakeway's payment of approximately $110,000.00 to bring current the 2.7 million dollar note, the

Austin group purchased that note from Southern. Southern subordinated its lien securing the remaining $600,000.00 note to that securing the 2.7 million dollar note. In order for Blakeway to make the $110,000.00 payment he had to borrow $80,000.00 from Southern. Such loan was represented by Blakeway's note to Southern which will be discussed hereinafter.

Although Southern did not agree with Quality to extend the date for its assumption of the permanent financing of the $600,000.00 note, no action was taken by Southern for the foreclosure of the lien securing that note until May 16, 1966. The note was then in default and on that date Southern posted for foreclosure the second lien upon the hotel securing it. By such posting the foreclosure was set for June 7, 1966.

After Southern posted notice of its foreclosure of its second lien the Austin group, holders of the first lien, evidenced some concern over such action and indicated that they were considering declaring their note in default and foreclosing their first lien. They did, in fact, accelerate their note. As a result, on May 31, 1966, Southern, the Austin group and Blakeway met and conferred as to the situation. It was at this meeting that Southern allegedly made the oral agreement upon which Blakeway's case is based. Although the evidence is contradictory on the subject, the jury found on sufficient evidence that such agreement was made.

The nature of the agreement made at the May 31 meeting must be considered in the light of the status of the title to the hotel property. As noted above, the ownership was such that it would be difficult, if not impossible, to procure an acceptable deed from the record title holder. All

parties, therefore, agreed that, for the purpose of making available a marketable title, Southern should proceed with its foreclosure so that it could then furnish an acceptable deed to the property.

Thus, the first agreement made at the May 31 meeting was that Southern should foreclose as planned. Next, Southern agreed that it would bid in the property on foreclosure sale for $600,000.00, the amount of the second lien note. (The buyer would of course, take subject to the Austin group's first lien). This would prevent Blakeway's liability for a deficiency.

Finally, at the May 31 meeting it was agreed that after the foreclosure Blakeway would continue to operate the hotel for a period of six to eight months—that he would "see that the doors of the hotel stayed open" for such period. It was recognized by all parties that it would be easier to find a buyer or financier for an operating hotel than for a closed one and that all would thus benefit from such continued operation. In connection with the agreement that Blakeway keep the hotel in operation, Southern agreed that Blakeway should have during such period the right to produce a buyer or lessee of the property or to refinance it, and that he should have the profit, if any, that would result from such sale, lease or refinancing.

As has been noted, Southern denied having made the oral agreements of May 31 as alleged by Blakeway, but the jury found on sufficient evidence that it did. There was also evidence which was sufficient to have sustained a verdict to the contrary. It was uncontroverted, however, that Southern did not perform in accordance with the terms of the alleged agreements. On June 7, at the fore-

closure, Southern bid in the hotel for $315,000.00. Thereupon Southern took possession of the hotel from Blakeway. Soon thereafter Southern's representatives organized a new corporation, Austin Crest Hotel, Inc., and Southern's interest in the hotel was formally sold to it for $400,000.00 represented by the corporation's promissory notes of $315,000.00 and $85,000.00. The Austin group had insisted upon its right to approve any new owner to whom Southern's interest in the hotel might be sold. The Austin group approved Lumberman's Investment Corporation as such an entity to which Southern could sell. Upon such approval the hotel was sold to that corporation for $400,000.00. Lumberman's Investment Corporation paid $100,000.00 on the first lien note, making it current, and the Austin group withdrew their acceleration of the note.

Suit was brought in Travis County by Blakeway and his wife against Southern National Bank and the Austin group. Upon the granting of Southern's plea of privilege the claims relating to Southern were severed and transferred to Harris County. Southern filed counter-claims upon the $80,000.00 note and for the deficiency suffered on the $600,000.00 note.

The jury, upon special issues submitted, found that an oral agreement, as that alleged above, was reached between the parties and that Blakeway suffered a loss of $1,356,886.03 as a result of Southern's breach of that agreement. They further found that Southern made those representations, as alleged above, that all such representations were false, that Blakeway relied upon the truth of such false representations and that such representations were material inducements to continue at his own expense

the operation of the hotel, to execute the $80,000.00 note, and to search for a purchaser. The damages sustained by Blakeway as a result of such reliance were found to have been $1,356,886.03.

The trial court, in a final corrected judgment and upon plaintiff's remittitur, adjudged that Blakeway recover from Southern $760,583.21 (which includes prejudgment interest) and that Southern recover nothing on its counter-claims.

Appeal is made upon eleven points of error. The first point contends error in overruling defendant's motion for instructed verdict and for submitting issues on contract or agreement since there is no proof of compliance with the statute of frauds. The next points assert that the trial court erred in submitting various issues to the jury and that the jury's answers were with no factual basis in the evidence or were against the great weight and preponderance of the evidence (points 2, 3, 4, 5, 7, 8 and 9). By points 6, 10 and 11 appellant asserts that the trial court erred in failing to instruct the jury in accordance with defendant's requested instruction on damages, in allowing plaintiffs' counsel to write "agreement" on the blackboard and display same before the jury, and in disallowing recovery on Southern's counter-claims.

We are met at the outset with American Nat. Ins. Co. v. Warnock, 131 Tex. 457, 114 S.W.2d 1161 (1938), a case which we feel controls this case. The facts are quite similar. In that case the Stockton Building Association, a corporation which owned the Rooney Hotel in Ft. Stockton, Texas, borrowed $25,000.00 from American National Insurance Company, defendant, giving a deed of trust on the hotel as security. The note being delin-

quent, on November 28, 1932, W. O. Watson, Assistant Treasurer of the insurance company and purporting to act for it, wrote to S. C. Johnson, who had been a stockholder in Stockton Building Association and in active control but had sold his stock to Warnock, and in the letter suggested a foreclosure and resale of the hotel. Johnson, after getting approval from Warnock, obtained an oral agreement from Watson that after foreclosure the company would resell to Johnson or his nominee. A letter by Johnson was written to Watson to this effect and Warnock made three monthly payments to the insurance company of $75.00 each toward the hotel's $25,000.00 indebtedness. These payments were discontinued when Watson stated that there was no such agreement and put the hotel in receivership.

About a year later Johnson sued some parties for rent due on other property upon which the defendant insurance company had a deed of trust. The insurance company was made a party defendant to this suit for rent. During this time, the insurance company was advertising the hotel for sale under its deed of trust. Warnock allegedly extracted another oral promise from the insurance company for resale of the hotel to Warnock in consideration of Johnson dismissing his suit against it. This too was later denied and the hotel was purchased by the insurance company and sold to a third party. Suit was brought by Warnock against the insurance company for damages. The defenses raised included the statute of frauds. The trial court rendered judgment for the plaintiff, Warnock.

The Court of Civil Appeals, considering both agreements as one, determined that it would be perpetrating a fraud to allow the seller insurance company to set up

the statute of frauds. Based primarily on Matthewson v. Fluhman, 41 S.W.2d 204 (Tex.Com.App. 1931, judgment adopted) and Morris v. Gaines, 82 Tex. 255, 17 S.W. 538 (1891), the Court of Civil Appeals affirmed Warnock's judgment for damages against the insurance company, holding that the defendant was estopped to raise the statute of frauds defense.

On appeal the Supreme Court reversed, asserting that removal of a parol sale of land from the operation of the statute of frauds, under Hooks v. Bridgewater, 111 Tex. 122, 229 S.D. 1114 (1921) requires the showing of:

> "1. Payment of the consideration, whether it be in money or services. 2. Possession by the vendee. And 3. The making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced. Payment of the consideration, though it be a payment in full, is not sufficient. This has been the law since Garner v. Stubblefield, 5 Tex. 552. Nor is possession of the premises by the vendee. Ann Berta Lodge No. [42, I.O.O.F. v. Leverton], 42 Tex. 18. Each of these three elements is indispensable, and they must all exist."

The Court held that the insurance company properly invoked the statute of frauds against the enforcement of the two contracts alleged by Warnock. For such reason, enforcement of such agreements was prohibited.

[1] The fact situation in the present case is akin to the facts presented in the first agreement reached between Johnson, Warnock and the insurance company—a prom-

ise by the insurance company after purchase at the foreclosure sale to resell to Johnson or his nominee, Warnock. Southern, who would become the owner upon the expected June 7 foreclosure, "promised" in effect a resale to Blakeway or his nominee with allowance to Blakeway of any resulting profits. This constitutes a conveyance in violation of the statute of frauds, Tex. Bus. & Comm. Code Ann. sec. 26.01(b)(4) (1967), V.T.C.A.

Appellees argue that, upon their performance of the requested consideration by keeping the hotel in operation at their own expense, either Southern is estopped to raise the statute of frauds or equity, under the circumstances, relieves this case from its operation. The real consideration for such future conveyance would have been payment of the indebtedness by Blakeway or his nominee.

[2, 3] For equity to estop one from asserting the defense of the statute of frauds or to relieve an agreement from its operation, acts of the party relying upon such promise must manifest the actual existence of such an agreement. The acts done must point to a specific agreement. In the present case the acts of Blakeway in keeping the hotel open at his expense do not necessarily point to such an agreement. The evidence shows that the maintaining and keeping open of the hotel were just as beneficial to Blakeway as to Southern and the Austin group. Any closing would have greatly diminished Blakeway's chances of selling the property, either before or after foreclosure, and would have sharply reduced its value. Besides, the manifestations required in an enforceable oral agreement to convey land are clearly set out in Hooks v. Bridgewater and American Nat. Ins. Co. v. Warnock, supra.

The fact that Blakeway was in a position similar to that of Johnson in the Warnock case and not a "nominee" as was Warnock does not affect the outcome. Neither the promisee nor his nominee could enforce the agreement or recover damages for the alleged breach of contract without the showing of compliance with the Hooks case. The statute of frauds prohibits enforcement of such agreements unless evidenced by a written memorandum, and the facts presented here failed to show sufficient grounds for the intervention of equity. Appellant's first point of error is sustained.

[4] As to appellant's last point concerning its counterclaims, this shall be sustained in part and overruled in part. The jury found that as part of the general agreement reached on May 31, 1966, Southern would not take less than 100 cents on the dollar for the $600,000.00 note at the June 7 foreclosure sale. The evidence presented on this matter is sufficient to sustain this finding. This is in effect an agreement to release Blakeway from liability for any deficiency judgment and as such is not a contract for the sale of land. Thus, compliance with the statute of frauds is not required and there need be no written memorandum. Lobit v. Marcoulides, 225 S.W. 757 (Tex.Civ.App., Galveston 1920, writ ref'd). The trial court's disallowing Southern any recovery on this deficiency was proper.

[5] As to the point of the $74,820.74 balance due on the $80,000.00 note, there is error and the point is sustained. Appellant has attacked special issues nos. 9, 10 and 11 as having no basis in the evidence. There is no showing by Blakeway that any representation caused him to execute the $80,000.00 note. His cause is based

upon an alleged oral agreement reached on May 31, 1966, and this $80,000.00 note was executed on May 2, 1966, to bring current the 2.7 million dollar note. No agreement can be pointed to upon which reliance can be based. Plaintiff has shown no valid defense to this counter-claim and the judgment should be corrected to allow Southern recovery of the balance due on the $80,000.00 note.

All other points are overruled. The judgment of the trial court is in part affirmed and is in part reversed and rendered as herein set forth.

## APPENDIX B

IN THE
SUPREME COURT OF TEXAS

From Harris County, Fourteenth District

January 24, 1973.

No. B-3636

CLAYTON E. BLAKEWAY, et al.

vs.

SOUTHERN NATIONAL BANK OF HOUSTON

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Application of petitioners for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error

requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is refused.

It is further ordered that applicants, Clayton E. Blakeway et al., pay all costs incurred on this application. (Justice Johnson not sitting.)

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From Harris County, Fourteenth District,

April 4, 1973.

No. B-3636

CLAYTON E. BLAKEWAY, et al.

vs.

SOUTHERN NATIONAL BANK OF HOUSTON

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Johnson not sitting.)

## APPENDIX C

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
11th JUDICIAL DISTRICT

No. 716,811

CLAYTON E. BLAKEWAY

v.

SOUTHERN NATIONAL BANK OF HOUSTON, et al

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### FINAL CORRECTED JUDGMENT

On the 20th day of August, 1971 came on to be heard plaintiffs' Motion to Correct, Modify and/or Amend the judgment entered herein on June 29, 1971, and such motion having been presented to the Court in due time, manner and form and with due notice, and it appearing to the Court that Paragraphs I and III of plaintiffs' said Motion should be granted to the extent indicated below, it is accordingly

ORDERED that the following paragraphs be deleted from the judgment entered on June 29, 1971, said paragraphs to be deleted and held to be null and void being as follows:

"it is further

ORDERED, ADJUDGED and DECREED that Southern National Bank of Houston do have and

recover from and against Clayton E. Blakeway, Flora B. Blakeway and Austin Crest Venture, jointly and severally, the sum of $430,500.00, plus interest thereon at the rate of six percent (6%) per annum from the date of entry hereof until paid.

It is further

"ORDERED, ADJUDGED and DECREED that Southern National Bank of Houston do have and recover from Clayton E. Blakeway and Austin Crest Venture, jointly and severally, the sum of $74,820.74, plus interest thereon at the rate of six percent (6%) per annum from the date of entry hereof until paid, and

and substituted in lieu of the foregoing paragraphs shall be the following:

"It is further ORDERED, ADJUDGED and DECREED that Southern National Bank of Houston, as counter-plaintiff, cross-plaintiff and third-party plaintiff do have and recover nothing on its alleged counter-claim, cross-action and third-party claim against the plaintiffs herein and counter-defendants, cross-defendants and third-party defendants, Clayton E. Blakeway, Flora B. Blakeway and Austin Crest Venture.",

and it is further ORDERED in accordance with Paragraph III of plaintiffs' said motion that plantiffs be allowed pre-judgment interest from February 7, 1967, a period commencing eight (8) months after June 7, 1966, and the Court's judgment of June 29, 1971 is accordingly amended by the addition of the following paragraph:

"It is further

ORDERED, ADJUDGED and DECREED that the

> plaintiffs do have and recover of and from the defendant the sum of $158,697.18 as pre-judgment interest, representing the legal rate of interest on the amount of plaintiffs' damages in the sum of $601,886.03 from February 7, 1967 to June 29, 1971, the date judgment was entered herein.";

and it appearing to the Court that all other relief prayed for in plaintiffs' said motion should be denied, it is accordingly so ORDERED, to which the plaintiffs and third-party defendants duly excepted and gave notice of appeal.

It further appearing to the Court that the judgment of June 29, 1971 should be further corrected by charging all costs to the defendant, Southern National Bank, it is accordingly

ORDERED, ADJUDGED and DECREED that the paragraph on page 5 of the Court's judgment of June 29, 1971 relating to the taxing of costs be deleted, and the following paragraph substituted in lieu thereof:

> "It is further ORDERED, ADJUDGED and DECREED by the Court that all costs of Court are taxed against the defendant, Southern National Bank, for which the Clerk may have his execution.",

and, as corrected, reformed, modified and amended, the corrected judgment of June 29, 1971 should read as follows:

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
11th JUDICIAL DISTRICT

No. 716,811

CLAYTON E. BLAKEWAY

v.

SOUTHERN NATIONAL BANK OF HOUSTON, et al

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# JUDGMENT

BE IT REMEMBERED that on the 26th day of May, 1971, came on to be heard in regular order the above entitled and numbered cause wherein Clayton E. Blakeway and Flora B. Blakeway are plaintiffs and counter-defendants, and Austin Crest Venture, a limited partnership, is third party defendant, and Southern National Bank of Houston is defendant, counter plaintiff and third party plaintiff, when came the plaintiffs, counter defendants and third party defendants in person and by and through their attorneys of record, and the defendant, counter plaintiff and third party plaintiff came in person and by and through its attorneys of record, and announced ready for trial; and a jury consisting of James D. Brown as foreman and eleven other qualified jurors having been duly impaneled and sworn to try said cause, and said cause having proceeded to trial on that day and the jury having retired on June 4, 1971 to consider their verdict and returned into open Court their verdict on June 4, 1971, consisting of the following answers to the Special Issues and Questions hereinafter set out:

QUESTION No. 1

"Do you find from a preponderance of the evidence that plaintiff Clayton Blakeway, and defendant, Southern National Bank's officers, (Schuette and Kuhlman) intended to and did enter into an oral agreement on May 31, 1966, with regard to plaintiff's operation of the Crest Hotel and the Bank's foreclosure of same?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

"If you have answered 'Yes' to (1), then answer (2), (3), (4), (5) and (6) from a preponderance of the evidence; if you have answered 'No' to (1), then do not answer (2), (3), (4), (5) and (6)."

QUESTION No. 2

"Did plaintiff and defendant agree that plantiff would continue to operate the hotel at his expense for 6 to 8 months from May 31, 1966?

(Answer 'Yes' or 'No')

To which the jury answered 'Yes'.

QUESTION No. 3

"Did plaintiff and defendant agree that plaintiff would have 6 to 8 months from May 31, 1966, to refinance the $3,300,000 loan, or try to secure another purchaser, or try to secure a lessee?

(Answer 'Yes' or 'No')

To which the jury answered 'Yes'."

QUESTION No. 4

"Did plaintiff and defendant agree that plantiff could have the profit, if any, from such refinancing, sale or

lease, if any was agreed upon?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

QUESTION No. 5

"Did plaintiff and defendant agree that defendant would not take less than $600,000 for the hotel at the foreclosure sale scheduled for June 7, 1966?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

QUESTION No. 6

"What do you find from a preponderance of the evidence to be the amount of the damages, if any, sustained by the plaintiff as a direct result of the foreclosure and sale of the hotel by the defendant, Southern National Bank?

(a) Find the amount of the monetary loss, if any, sustained by plaintiff as a direct result of his operating the hotel until June 7, 1966.

(Answer in Dollars and Cents, if any)

To which the Jury answered '$256,886.03'.

(b) Find the amount of the monetary loss, if any, (other than that found in answer to "a" above) sustained by plaintiff as a direct result of his not being permitted to refinance the hotel loan, sell or lease the hotel (if you found there was any agreement to permit him to do so).

(Answer in Dollars and Cents, if any)

To which the Jury answered '$1,100,000.00'.

QUESTION No. 7

"Do you find from a preponderance of the evidence that defendant, Southern National Bank, represented to the plaintiff, Clayton Blakeway, any or all of the following items:

(a) That Blakeway would have from 6 to 8 months within which to either recast the financing, and a purchase or secure a lessee for the Crest Hotel?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

(b) That if Blakeway was able to find a purchaser, or recast the financing or secure a lessee, he could retain the excess over and above the total $3,300,000 outstanding against the Crest Hotel?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

(c) That Blakeway would be allowed to continue to operate the Crest Hotel for 6 to 8 months?
(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

(d) That the Bank would not accept less than 100¢ on the dollar for the $600,000 note?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

If you answered "Yes" to (7), then answer (8), (9), (10) & (11) from a preponderance of the evidence; if you answered "No" to (7), and to all parts thereof, do not answer (8), (9), (10) and (11).

QUESTION No. 8

"Do you find that any of the representations listed

above, if any you have found, were false, indicating which items were false, if any?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes—a,b,c,d'."

QUESTION No. 9

"Do you find that such false representations, if any, were a material inducement to plaintiff, Blakeway, in his operation of the hotel at his expense, in executing the $80,000 note, and searching for purchaser and lessee of the hotel?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

QUESTION No. 10

"Do you find that plaintiff, Blakeway, relied on the truth of such false representations, if any you have found, in his operation of the hotel at his expense, in executing the $80,000 note and searching for purchaser and lessees of the hotel?

(Answer 'Yes' or 'No')

To which the Jury answered 'Yes'."

QUESTION No. 11

"What do you find, from a preponderance of the evidence, to be the amount of the damages, if any, sustained by plaintiff, Blakeway, as a result of his reliance, if any, on the misrepresentations, if any, of defendant, Southern National Bank?

(Answer by stating the amount, if any, in dollars and cents)

To which the Jury answered '$1,356,886.03'."

"And the Court, having considered the verdict of the Jury and the answers of the Jury to the Special Issues and Questions submitted to it, and the Court being fully advised in the premises and being guided by the verdict of the Jury does here and now enter Judgment as follows:

"It is ORDERED, ADJUDGED and DECREED that the plaintiffs, Clayton E. Blakeway and Flora B. Blakeway, do have and recover of the defendant, Southern National Bank, the total sum of One Million Three Hundred Fifty-Six Thousand Eight Hundred Eighty-Six and 03/100 ($1,356,886.03) dollars, together with interest thereon at the rate of six percent (6%) per annum from this date, and it is further

"ORDERED, ADJUDGED and DECREED that the plaintiffs do have and recover of and from the defendant, Southern National Bank, the sum of $158,697.18 as prejudgment interest, representing the legal rate of interest on the amount of plaintiffs' damages in the sum of $601,886,03 from February 7, 1967 to June 29, 1971, the date judgment was entered herein. It is further

"ORDERED, ADJUDGED and DECREED that Southern National Bank of Houston, as counter-plaintiff, cross-plaintiff and third-party plaintiff do have and recover nothing on its alleged counter-claim, cross-action and third-party claim against the plaintiffs herein and counter-defendants, cross-defendants and third-party defendants, Clayton E. Blakeway, Flora B. Blakeway and Austin Crest Venture, and it is further

"ORDERED, ADJUDGED and DECREED by the Court that all costs of Court are taxed against the defendant, Southern National Bank, for which the Clerk may have his execution."

All relief prayed for by either party hereto which is not herein specifically granted is denied.

And it further appearing to the Court that the plaintiffs, within due time and in proper manner, agreed in open Court to remit the sum of $255,000.00 under Question No. 6(a), to remit the sum of $500,000 under Question No. 6(b) and to remit the sum of $755,000.00 under Question No. 11, it is therefore accordingly

ORDERED, ADJUDGED and DECREED that Southern National Bank's amended motion for new trial be in all things overruled.

In summary of the foregoing findings, rulings, modifications, and remittiturs, it is finally

ORDERED, ADJUDGED and DECREED that plaintiffs, Clayton E. Blakeway and Flora B. Blakeway do have and recover from the defendant, Southern National Bank, the total sum (including pre-judgment interest) of $760,583.21, together with interest thereon at the rate of six percent (6%) per annum from the date of this Final Judgment, namely August 26, 1971.

To which rulings of the Court the defendant, Southern National Bank, in open Court duly excepted and gave notice of appeal to the Court of Civil Appeals sitting in Houston, Texas, and, in the event the defendant appeals, the plaintiffs, Clayton E. Blakeway, Flora B. Blakeway and Austin Crest Venture, duly except to the requirement of agreeing to a remittitur and specifically reserve and

preserve their right to cross-assign appeal to the Trial Court's requirement of a remittitur.

RENDERED, SIGNED and ENTERED this 26th day of August, 1971.

By: WM. BLANTON, JR.
Judge

Approved as to Form:
ANDREWS, KURTH, CAMPBELL
& Jones

By: GEORGE H. HAGLE
George H. Hagle

Attorneys for Southern National Bank

BROCK & WILLIAMS

By: WARNER F. BROCK
Warner F. Brock

Attorneys for Clayton F. Blakeway, et al

## APPENDIX D

Application for Writ of Error Rule 469

Special Commentary

### THE APPLICATION FOR WRIT OF ERROR

By Hon. Robert W. Calvert, Chief Justice
Supreme Court of Texas

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If the following suggestions seem to lay undue stress on brevity, that tendency can best be understood by knowing something of the work-load of the Supreme Court and the manner in which it seeks to deal with it.

Work-Load:

It would be an ideal situation if every application for writ of error could have the personal study of each Justice of the Supreme Court, but the work-load of the Court makes that impossible. In consequence, the Court has adopted the next best plan. It no longer works in sections, but in full conference.

One Justice studies an application and reports to the conference. Monday morning of each week is devoted to conference work on applications for writ of error. All day Tuesday is devoted to conference work on opinion, motions for rehearing and applications for writ of error. Wednesday is set aside for hearing oral arguments in causes which are usually concluded by noon. The Justices will thus usually have the equivalent of four days per week (including Saturday) to study applications, opinions and motions for rehearing, and to write opinions.

In the calender year 1966, each Justice in each month of approximately 16 days free working time, on an average, wrote one opinion, studied and approved or dissented from 8 opinions of his colleagues, studied and reported on 6 applications for writ of error and 3 motions for rehearing thereon and studied 8 motions for rehearing in causes. In addition, attention must be given to mandamus and habeas corpus proceedings which are coming in increasing numbers.

How the Court Works:

No Justice chooses the applications for writ of error which he is to study. All applications are received in the Clerk's office and, except where a Justice is disqualified or recuses himself, are distributed to the various Justices' offices in strict rotation.

The application, the answer thereto, the opinion of the Court of Civil Appeals, the leading cases cited by the parties, and the record where the parties differ with respect thereto or it otherwise appears necessary—are studied by the Justice to whom referred and he makes a full report of his study to the conference. The report is followed by a general discussion with each Justice being asked to express his views.

The conference discussion frequently leads to further study of the application, either by the Justice to whom it was referred or by one or more of the other Justices, and a vote is not taken on its disposition until all of the Justices are satisfied that they understand the facts of the case and the law questions involved.

Applications presenting questions of unusual importance to the jurisprudence of the state are usually distrib-

uted to and studied by all nine Justices before a conference decision is reached.

Address of the Application:

The application should be addressed to "The Supreme Court of Texas." The party or parties applying for a writ should be designated "Petitioner" or "Petitioners" and the opposing party or parties should be designated "Respondent" or "Respondents". It sometimes occurs that both parties are dissatisfied with the judgment of the Court of Civil Appeals, in which event each should file a separate application in which he styles himself "Petitioner" and the opposing party "Respondent". EXAMPLE: A judgment of the trial court may have been reversed and the cause remanded for retrial because of improper argument of counsel or misconduct of the jury. If the appellant had before the Court of Civil Appeals a point of error which, if sustained, would have resulted in rendition of judgment in his favor, he may wish to continue to prosecute that point before the Supreme Court and should apply for writ of error. The appellee, on the other hand, may believe that the Court of Civil Appeals was in error in reversing and remanding the cause, in which event he also should apply for a writ.

Statement of the Nature of the Case:

Keeping in mind that the opinion of the Court of Civil Appeals is always before the Supreme Court, the petitioner should confine this part of his application to a general statement of the nature and result of the case. Rule 469 makes clear how this should be done and gives an example for guidance. A more detailed statement of the pertinent facts should be reserved for the statement to be made in briefing the various Points of Error.

In pointing out the particular aspects in which the Court of Civil Appeals has misstated or omitted material facts, the petitioner should number them consecutively and make them brief.

* * *

Action on the Application

A report on an application for writ of error and a conference discussion thereof may lead to any one of a number of courses of action, controlled generally by Rule 483.

If the application was not filed within the time prescribed by Rule 486 it will be "Dismissed for Want of Jurisdiction". Strangely enough such dismissals are not infrequent.

If the Court has no jurisdiction under Art. 1728, the application will be "Dismissed for Want of Jurisdiction".

If as many as three of the Justices believe the judgment of the Court of Civil Appeals is erroneous, the writ will be "Granted" and the Points of Error on which it is granted will be indicated. All Points will be considered in finally deciding the case but oral arguments should be concentrated on the designated points.

If no more than two of the Justices believe the judgment of the Court of Civil Appeals is erroneous, the writ will be denied and the conference then determines whether the application will be stamped "Refused" or "Refused. No Reversible Error."

The notation "Refused. No Reversible Error" is applied automatically if the opinion of the Court of Civil Appeals

has dealt with questions which are not within the jurisdiction of the Supreme Court or which are not brought forward by Points of Error for review by the Supreme Court (Shambry v. Housing Authority, 1953, 152 T. 122, 255 S.W.2d 184); or if the opinion of the Court of Civil Appeals has dealt with questions of law not necessary to a decision of the case. * * *